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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re ANDREA N. et al., Persons Coming  
Under the Juvenile Court Law.

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LOS ANGELES COUNTY DEPARTMENT  
OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

JOSE N.,

Defendant and Appellant.

B220063

(Los Angeles County  
Super. Ct. No. CK71813)

APPEAL from an order of the Superior Court of Los Angeles County, Jan Levine,  
Judge. Affirmed.

Grace Clark for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County  
Counsel, and Melinda S. White, Deputy County Counsel for Plaintiff and Respondent.

## I.

### INTRODUCTION

Jose N. (Father) appeals from the order of the dependency court terminating his parental rights to his four children. He contends the court abused its discretion in denying his Welfare and Institutions Code section 388 petition.<sup>1</sup> We affirm.

## II.

### FACTUAL AND PROCEDURAL BACKGROUND

#### A. *Initial facts.*

On February 28, 2008, the Los Angeles County Sheriff's Department served a search warrant on a home located in Artesia, California. They found drug paraphernalia and the five children of Maria G. (Mother) in the home, alone. The Department of Children and Family Services (DCFS or the Department) took protective custody of the children when Mother did not return home after an extended period of time. The eldest child was Andrea N. The other children were Angel N., E.N., Cassandra N., and the youngest, Ruben R. Father is the parent of the eldest four children, but not of Ruben.<sup>2</sup>

At the time of the search, Father was incarcerated, having been sentenced in July 2006 to serve a 32 month prison term for violating parole due to violating Health and Safety Code section 11377, subdivision (a), possession of a controlled substance. Father also had an extensive criminal history beginning in November 1989. From November 1989 through July 2006, Father had nine criminal convictions. These included six drug and alcohol related convictions, as well as convictions for obstructing/resisting a public officer, possessing burglary tools, and driving without a license. Additionally, during this time, Father's probation or parole had been revoked four times for drug offenses or carjacking.

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<sup>1</sup> Unless otherwise indicated, all further statutory references are to the Welfare and Institutions Code.

<sup>2</sup> Because Mother and Ruben are not parties to this appeal, we have limited the facts that pertain to them.

*B. The Section 300 petition.*

On March 4, 2008, the Department filed a dependency petition pursuant to Section 300, subdivisions (a), (b), and (g), and the dependency court detained the children.

In a report dated March 27, 2008, the social worker reported the following. Andrea stated there had been physical altercations between her parents, Father angered easily and used drugs, and Father had not assisted in caring for the children. Andrea also stated that she had chosen not to speak to Father because of his anger, she did not like his lifestyle, she resented that he had always been in prison, and he had not spent much time with her because he was always incarcerated. The three older children stated they wanted to live with their maternal aunt, Bertha, until they could return to Mother. Mother was also interviewed in March 2008. Mother admitted she and Father had a physical and verbal violent relationship. Mother stated that the children were afraid of Father and he angered easily. Mother admitted she and Father used drugs together and that on February 28, 2008 she had left the children home, alone, to “get high.” Mother also reported that even when Father was not incarcerated, he did not consistently provide for the children.

In a March 2008 interview with a social worker, Father stated that his relationship with Mother had not become violent until after E. was born in 2001, after which Mother had been arrested for assault. Father admitted, however, that he had gotten into fights, had a bad temper, and his arrest for carjacking and assault was due to a physical altercation. Father admitted having an addiction problem. He stated that he started using marijuana and drinking at the age of 13, cocaine in 1991, and methamphetamine around 1996. Father admitted he did not consistently provide financial assistance to the family, but claimed that since 2006 he had been helping the family, even though he was incarcerated.

On April 4, 2008, the children were placed with Bertha and the Department was ordered to provide reunification services to Father.

On May 13, 2008, DCFS submitted a report to the court detailing that Father had been participating in services while incarcerated. This included participating in a

Phoenix House Substance Abuse Program since 2006. He was expected to continue to receive services upon his parole.

On May 13, 2008, the dependency court sustained the Section 300 petition, as amended. The court sustained the petition regarding the count alleging domestic violence between the parents, the count regarding Mother's substance abuse, and the count regarding Mother leaving the children alone, without adult supervision. The court also sustained the counts that Father had a history of drug abuse and an extensive history of drug-related convictions, and that he had failed to provide the children with the necessities of life. The court declared Father's children dependents. The court ordered family reunification services and monitored visitation with Father. Father was ordered to participate in a DCFS-approved program of parent education, drug counseling, rehabilitation with random drug testing, and individual counseling to address case issues, including domestic violence.

Father was released from prison in July 2008 and immediately entered a three month residential substance abuse program at the Substance Abuse Foundation.

*C. The review hearings.*

In its November 4, 2008 status report, DCFS reported the following. Mother's whereabouts were unknown. Father had been residing at the residential substance abuse treatment center and was complying with court orders, including testing clean. Father stated he wanted to have regular visitation with the children and he planned on entering a sober living home once he completed the three month residential drug treatment program. Bertha expressed a desire to become the children's legal guardian. The Department recommended that Father's rights be terminated and a permanent plan be implemented.

DCFS submitted a supplemental report for the December 22, 2008 Section 366.21, subdivision (e) hearing. DCFS reported the following. Father stated that as of December 15, 2008, he had dropped out of the residential substance abuse treatment program in order to complete job training and obtain a job. Father said he had completed parenting education classes, but stated he would no longer attend domestic violence

counseling or other counseling through the Substance Abuse Foundation. Father indicated that he would continue to participate in random drug testing.

In another report submitted by DCFS for the December 22, 2008 hearing, DCFS reported the following. All of the children wanted to live with Bertha and none wanted to reunify with Father. Father had completed 360 hours of anger management classes, 360 hours of parenting classes, and 720 hours of substance abuse treatment classes. Father continued to test clean for drugs. He had been visiting with the children once a week for one hour. Andrea refused to interact with him. Bertha had previously expressed a desire to be the children's guardian. She now wanted to adopt the children. DCFS requested the court terminate reunification services and set a selection and implementation hearing with adoption as the permanent plan.

The Section 366.21, subdivision (e) hearing was continued twice.

The Department reported in its March 12, 2009, report that Father had been living with his girlfriend and was not working. DCFS also reported the following. Father was not drug testing and not participating in a drug relapse program. In December 2008, he had dropped out of a six month drug treatment program, completing only four months. Father was, however, participating in domestic violence counseling. He continued to have one hour weekly visits with three children; Andrea refused to interact with Father.

On March 12, 2009, the dependency court deemed the Department's report a Section 366.21, subdivision (f) report and set a contested hearing for April 10, 2009. The court ordered additional reunification services.

In its April 10, 2009, interim report, DCFS noted that Father had not contacted the social worker for a month, had not provided proof of participation in any programs, and his visitation with the children had been sporadic. The children said they no longer wanted to have any contact with Father. The April 10, 2009 hearing was continued.

In DCFS's May 5, 2009, report, the social worker stated that every time the social worker tried to meet with Father since January 2009, Father did not appear. The social worker also reported that Father had failed to comply with the case plan during the past

12 months. The Department again recommended that Father's parental rights be terminated.

On May 5, 2009, Father was represented, but he did not appear personally. The court terminated Father's reunification services and scheduled a selection and implementation hearing.

*D. Father's Section 388 petition and the selection and implementation hearing.*

On September 8, 2009, the Department completed the home study for Bertha.

On September 25, 2009, Father filed a Section 388 petition requesting six more months of reunification services, including conjoint counseling with his children. He suggested that counseling could rebuild his relationship with his children. Father attached to his petition a number of certificates and other documents. These demonstrated that while Father had been incarcerated he participated in an array of programs and activities, including anger management classes, parenting classes, substance abuse programs, and bible studies. Documents also showed that once Father was no longer incarcerated, he attended residential and nonresidential substance abuse programs, "H&I" meetings, and 12 step programs. For example, a September 8, 2009 letter showed that since June 16, 2009, Father had been enrolled in the Community Education Centers, Inc. of Long Beach Residential Treatment Program. Other, undated documents, showed Father had attended domestic violence classes and obtained his high school equivalency certificate.

In its October 28, 2009, status review report, DCFS reported that Father had not visited the children during the past period of supervision. DCFS further reported that on October 14, 2009, the children again stated that they did not want any contact with Father.

On October 28, 2009, the dependency court denied a hearing on Father's Section 388 petition. The court acknowledged that Father had done a lot of work before and after the case was filed. But, Father had not completed the programs as mandated by the case plan. The court also found that it was in the best interests of the children to place them

with Bertha, as this would be consistent with the children's wishes and would provide them permanence and stability.

The court then proceeded to the Section 366.26 hearing. The court terminated Father's parental rights of Andrea, Angel, E., and Cassandra.

Father timely appealed.

### III.

#### DISCUSSION

*The dependency court did not abuse its discretion in denying Father's Section 388 petition.*

A Section 388 petition seeks to modify the status quo in a dependency case. "Under section 388, a parent may petition the court to change, modify, or set aside a previous court order. The petitioning party has the burden of showing, by a preponderance of the evidence, that [(1)] there is a change of circumstances or new evidence, and [(2)] the proposed modification is in the minor's best interests. [Citations.]" (*In re S.M.* (2004) 118 Cal.App.4th 1108, 1119; accord, *In re D.R.* (2007) 155 Cal.App.4th 480, 487.)

In reviewing a Section 388 petition, the dependency court may hold a hearing on the petition, or summarily deny it. (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 912.) The parent seeking modification must "only make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]" (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310; *In re Lesly G.*, *supra*, at p. 912.) "The petition should be liberally construed in favor of its sufficiency. [Citation.]" (*In re D.R.*, *supra*, 155 Cal.App.4th at p. 487; *In re Daijah T.* (2000) 83 Cal.App.4th 666, 672.)<sup>3</sup>

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<sup>3</sup> Section 388 states in part: "(a) Any parent . . . having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. . . . [¶] . . . [¶] (d) If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held . . . ."

“In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case. [Citation.]” (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.) “‘The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition.’ [Citations.]” (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505; accord, *In re Mary G.* (2007) 151 Cal.App.4th 184, 205.)

The ruling on a Section 388 petition is addressed to the sound discretion of the dependency court and will not be disturbed on appeal without a showing of a clear abuse of that discretion. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415-416; *In re Ramone R.* (2005) 132 Cal.App.4th 1339, 1348.)

Here, with regard to the first prong, Father did not make a prima facie showing that there had been a change of circumstances or new evidence since the court terminated reunification services. While Father had made some progress, he had not changed. Father’s drug problems began when he was 13 years old, when he started using marijuana. He then moved on to cocaine and methamphetamine. He had an extensive criminal history that lasted more than 16 years. Six of his nine criminal convictions were drug or alcohol related.

On May 13, 2008, the court ordered Father to participate in drug counseling, random drug testing, parenting education, and individual counseling. A year later, on May 5, 2009, Father’s reunification services were terminated because he had not complied with the case plan. Father initially participated in a comprehensive residential treatment program, but left the program after just four months. In December 2008, he stopped complying with random drug testing. In April 2009, his visitation with his children had become sporadic. Father’s enrollment and participation in a residential program beginning in June 2009 for three months and in twelve steps programs have put him back on a road to sobriety. However, these efforts, when contrasted with his lengthy history of drug abuse, the years in which he had not participated in the lives of his children, was not sufficient to show he had changed.



Therefore, Father did not demonstrate a significant change of circumstances. He had not completed his programs, nor had he given the children a sense of stability. (Compare with *In re Hashem H.* (1996) 45 Cal.App.4th 1791 [juvenile court abuses discretion in summarily denying Section 388 petition when parent has consistently participated in individual and conjoint counseling, regularly visited with child, held a full-time job, provided stable home for child, and therapist recommended child be returned to parent's custody].) While we applaud Father's efforts, he has not shown that he has changed his life and tackled his substance abuse problem. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47 [petition alleging changing circumstances, rather than changed circumstances, is insufficient].)

With regard to the second prong, Father has not made a prima facie showing that the proposed modification is in the best interests of the children. Among the factors dependency courts consider in determining whether a proposed change of order is in a child's best interest are: "(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532.)

Here, Father's use of drugs, his history of domestic violence, his lack of compliance with the case plan, his lack of drug testing, and his failure to complete programs, are serious problems that cannot easily be ameliorated. Father has taken steps toward resolving these problems, but has not adhered to the case plan. As examples, he has not continually been involved with a drug substance abuse program and has not solidified a relationship with his children. Further, the record demonstrates that the children have a strong bond with their aunt Bertha, and not Father. All of the children have voiced a preference to live with Bertha and not to visit or communicate with Father. The children are uncomfortable being with Father, who has not played a significant role in their lives. Thus, he has not shown that granting the Section 388 petition is in the best interests of the children.

In that the dependency court did not abuse its discretion in denying Father's Section 388 petition, the order terminating parental rights is affirmed.

IV.

DISPOSITION

The order is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.